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Reasonable Grounds Evidence Involving Sexual Violence in Darfur

John Hagan, Richard Brooks, and Todd Haugh

Internal and international conflicts can often involve a level of impunity that allows sexual violence to persist unchecked by military and political leaders. The recent reversal by an appeals panel at the International Criminal Court of a pretrial decision not to charge President al-Bashir of Sudan with genocide in Darfur offers an important foundation for introducing new types of evidence that can increase the investigation and prosecution of sexual violence during conflicts. The reversal cited the incorrect use of the “beyond a reasonable doubt” standard when the lesser standard of “reasonable grounds” applied. Social science provides methods and measures that can be uniquely used to develop reasonable grounds evidence, for example, to demonstrate the roles of physical perpetrators acting together in horizontal relationships, as well as to establish the indirect participation through vertical relationships of higher-level defendants, in a chain of command of superior responsibility. We illustrate these points by presenting social science evidence of the responsibility of President al-Bashir and middle- and lower-level figures in genocidal violence in Darfur.

INTRODUCTION: THE CALL FOR A NEW TYPE OF EVIDENCE

In remarks to The Hague Colloquium on Sexual Violence as International Crime, Luis Moreno-Ocampo (2009; also in this symposium), prosecutor of the International Criminal Court (ICC), observed that cases of gender

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and sexual violence committed during conflict are “particularly problematic” because “these crimes are often underreported.” UN High Commissioner on Human Rights Navanethem Pillay (2009a, also in this symposium) similarly observed in her remarks to the colloquium that “we [the international community] are only addressing the tip of the iceberg . . . merely scratching the surface” in prosecuting sexual violence perpetrated during conflict. Both Prosecutor Moreno-Ocampo and High Commissioner Pillay spoke to what those victimized during conflict know directly: below the surface of internal and international conflict is a massive level of impunity that allows sexual violence to persist unchecked by military and political leaders. As seen in conflicts such as Darfur, the sexual violence has also often been left unchecked by international law.

High Commissioner Pillay (2009b) nonetheless highlighted the work of international tribunals in the 1990s and insisted that the prosecution of sexual violence committed during conflict was “a triumph for women who had previously been considered ‘collateral damage’” (460; see also Center on Law and Globalization 2009b). Prosecuting sexual violence “has to be done,” she said, “even in situations where women cannot identify perpetrators” (*ibid.*). High Commissioner Pillay insisted that “a good prosecutor should be able to argue a case without individual testimony by establishing the planning, the modus, and the effects of the crime” (466). Prosecutor Moreno-Ocampo (*n.d.*) made a similar declaration. “Our goal is to go . . . further: a case with no witnesses, no victims.” He expressed a desire for a new kind of evidence to be made available to those prosecuting the most serious of international crimes: “We want to use methods [that social scientists] are developing, such as statistical analysis. We must refine how to use your tools.”

Xabier Agirre, senior analyst from the ICC’s Office of the Prosecutor, echoed Prosecutor Moreno-Ocampo’s call for a new type of evidence. Agirre spoke to the colloquium more specifically regarding what role social scientists can play in developing this evidence (Center on Law and Globalization 2009a). He identified three social scientific needs: “[1] to get a level of description of the patterns of the crime; [2] then, to correlate the crime with command structures that produced it; [3] then to explain what caused it.” Agirre also gave social scientists a specific directive: “We need descriptive statistics to show that the crime is grave, that its scope warrants the International Criminal Court, which intends to take on only the most serious cases.”

The remarks of these three speakers preceded a commentary by law professor Harmen van der Wilt (2009). Professor van der Wilt spoke regarding the ICC’s decision to issue an arrest warrant for Sudan’s President Omar al-Bashir for war crimes and crimes against humanity, including rape, as well as Prosecutor Moreno-Ocampo’s denied application on the charge of genocide (see *Situation in Darfur* 2008, 1). Van der Wilt’s (2009) central point was that in prosecuting high-level officials, international criminal law has oscillated between ideas about “joint criminal enterprise” and the concepts

of “co-perpetration” and “participation” (308). He concluded that a “huge challenge of judges and prosecutors alike is to portray men like Al Bashir as ‘spiders in the web,’ demonstrating how they interact and communicate with others in order to accomplish their devious goals” (308).

The common message of the four speakers—the necessity of developing new types of evidence to aid in the investigation and prosecution of international crimes—was highly relevant to the evidentiary issues addressed in recent actions of the ICC Appeals Chamber. On February 3, 2010, the Appeals Chamber reversed the Pretrial Chamber’s decision not to issue an arrest warrant for President al-Bashir on the crime of genocide (see *Prosecutor v. Al Bashir* 2010). The Appeals Chamber reasoned that the Pretrial Chamber had applied an erroneously high “beyond-a-reasonable-doubt” standard of proof when it decided whether an arrest warrant would be issued for President al-Bashir (see paras. 30–33).¹ According to the Appeals Chamber, consistent with the Rome Statute,² the beyond-a-reasonable-doubt standard only applies at the trial stage of a prosecution, not at the investigation and arrest stage (see paras. 30–33). The Appeals Chamber ruled that the standard of proof at the pretrial stage is the lesser standard of whether there were “reasonable grounds to believe” that President al-Bashir committed genocide (paras. 30, 42). Because the Pretrial Chamber misapplied the legal standard in addressing the genocide charge, the Appeals Chamber remanded the issue for a “new decision, using the correct standard of proof” (para. 42). At the time, Prosecutor Moreno-Ocampo vowed to introduce new evidence of President al-Bashir’s genocidal intent sufficient to meet the standard of “reasonable grounds.”³

1. The Pretrial Chamber concluded that an arrest warrant could only be issued if the existence of genocidal intent was the *only* reasonable conclusion to be drawn from the evidence (see *Prosecutor v. Al Bashir* 2009a).

2. The applicable section of the Rome Statute of the International Criminal Court (1998) provides as follows:

At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

- (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
- (b) The arrest of the person appears necessary:
 - (i) To ensure the person’s appearance at trial,
 - (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
 - (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

3. Prosecutor Moreno-Ocampo told Reuters that he would present new evidence to the ICC to support his application to have al-Bashir charged with genocide. Specifically, Moreno-Ocampo noted al-Bashir’s expulsion of humanitarian assistance from Darfur: “When he expelled these people who were providing the water and the food he confirmed his intention to destroy his people” (quoted in Reuters 2010).

On July 12, 2010, the Pretrial Chamber, now following the correct legal standard, issued a ruling finding that there were reasonable grounds to believe al-Bashir committed genocide. The subsequent arrest warrant cited al-Bashir's "specific intent to destroy in part the Fur, Masalit [sic] and Zaghawa ethnic groups."⁴

I. THE ROLE OF SOCIAL SCIENCE EVIDENCE

In their comments at the colloquium, Prosecutor Moreno-Ocampo and High Commissioner Pillay set a bold and far-sighted agenda. They have embraced the innovative use of social science evidence to supplement traditional legal approaches in gathering evidence and prosecuting crimes of sexual violence committed during international and internal conflicts—crimes that are often precursors to and are themselves acts of genocide. The tools of social science are uniquely able to develop the type of reasonable grounds evidence necessary to support such charges. Social science evidence, unlike traditional modes of evidence, can demonstrate the roles of the perpetrators of genocide acting together in horizontal relationships as well as establish the indirect participation of perpetrators through vertical relationships, linking higher-level defendants in a chain of command of superior responsibility.

It is just this type of evidence that is now being called for by the ICC. High Commissioner Pillay (2009b) noted that joint criminal enterprise, a key concept in the prosecution of joint participation in sexual violence,

refers to any individual who plans, instigates, commits, orders or abets the execution of crimes. It does not require the direct hand or the physical participation of the accused in the perpetration of the criminal act. Rather, it applies when this individual participates in criminal conduct with a plurality of actors. (463)

High Commissioner Pillay (2009a; also in this symposium) emphasized that "the responsibility lies not just with the military leaders, but with their political masters as well." Prosecutor Moreno-Ocampo charged that in Darfur,

Victims from Darfur recently joined Prosecutor Moreno-Campo's appeal, which successfully reversed the decision by the Pretrial Chamber. The victims supported the argument that a lower standard of proof applied at the pretrial investigation stage. They argued, and the Appeals Chamber agreed, that the Pretrial Chamber erred in applying "an overly critical evaluation of the evidence" (See Situation in Darfur (2010, para. 32); see also *Prosecutor v. Al Bashir* (2010, para. 39)).

4. *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ("Omar AlBashir"), Case No. ICC-02/05-01/09, Second Warrant for Arrest of Omar Hassan Ahmad Al Bashir, 8–9 (July 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>.

this chain of command ran through Sudan's governing hierarchy, including President al-Bashir and Deputy Minister of the Interior Ahmad Harun (see *Situation in Darfur* 2008, 8).⁵

Evidence of joint participation in crimes of sexual violence, especially that rising to the level of genocide, is difficult to develop, however. As van der Wilt (2009) commented, "the choice of a proper concept of criminal responsibility sustaining the charge against high-level perpetrators like President Al Bashir is not obvious, especially not at the early stages of investigation" (307). Yet joint enterprise evidence must be developed if case investigation and preparation for the prosecution of crimes of genocide are to proceed.⁶

In this article, we present this evidence—evidence sufficient to meet the reasonable grounds standard required by the Rome Statute and recently enunciated by the Appeals Chamber—as to President al-Bashir's joint participation in the crime of genocide. The evidence is developed from the US Department of State (2004) Atrocities Documentation Survey (ADS).⁷ The specific evidence we present is based on the uniquely detailed ADS data set, which includes reports of sexual victimization as well as other forms of violence. The method of analysis we apply to the ADS data—hierarchical linear modeling (HLM)—allows us to document the targeting of groups of persons identified in the ethnic and racial terms protected under the Genocide Convention (see part III). HLM analysis additionally allows us to focus on group or village clusters, as well as on the individual level, to document occurrences of violence that are aimed at the destruction of ethnic groups in

5. Legal scholars call these hierarchical forms of participation "indirect co-perpetration," "perpetration-by-means," "perpetration by another person," and "control over an organization" (see van der Wilt 2009, 308). All ultimately involve the superior responsibility invoked by Hugo Grotius (1964) when he wrote centuries ago that "we must accept the principle that he who knows of a crime, and is able and bound to prevent it but fails to do so, himself commits a crime" (523).

6. David Scheffer (2002, 237–48; 2006, 398), the first US ambassador on war crimes, recommended distinguishing between "mass atrocity law" and "mass atrocity crime" as a way to address this difficulty. At early stages in cases, Scheffer prioritized establishing patterns of atrocity crime over resolving issues of atrocity law (see Scheffer 2002, 399–400; 2006, 237–44).

According to Article II of the Genocide Convention, genocide consists of any of the following five acts

committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group. (Convention on the Prevention and Punishment of the Crime of Genocide 1948).

7. The information gathered as part of the ADS, which was collected for then-Secretary of State Colin Powell from 1,136 refugees across Sudan's Darfur border in Chad, became the foundation for Powell's charge before the US Senate Foreign Relations Committee that genocide occurred in Darfur (see Powell 2004).

whole or in part (see part III). Our analysis further examines the joining of government of Sudan (GoS) troops with local Arab militias in attacks on black African villagers, indicating the responsibility of government leaders, including President al-Bashir, in a joint enterprise chain of command (see part III). Our ultimate conclusion is that, through the documentation and analysis of the ADS data, reasonable grounds evidence sufficient to charge, arrest, and aid in convicting President Al Bashir for the crime of genocide in Darfur does exist.

II. DEVASTATION, IMPUNITY, DENIAL, AND OBSTACLES TO RESEARCH INVOLVING SEXUAL VIOLENCE COMMITTED DURING CONFLICT

Before elaborating on our analysis, we will first discuss why the evidence gleaned from the ADS is so important, why such evidence is so rarely developed and so scarce, how the scarcity of this evidence allows for the denial of sexual violence committed during conflict to continue, and how obstacles to research on mass atrocities can be overcome.

Devastation

Public health scholars have studied the devastating physical, mental, and social consequences of the epidemic occurrence of rape and sexual violence in conflict zones (Levy and Sidel 1997; Reed and Keely 2001). Health scholars conceptualize this violence within their study of “complex humanitarian emergencies” (see Waldman and Martone 1999, discussing “complex emergencies” in the context of humanitarian efforts). The most obvious near-term health consequences to victims of sexual violence include physical injury, reproductive trauma and harm, the spread of sexually transmitted diseases (including HIV), and unwanted pregnancies (Acquire Technical Update 2006). Long-lasting health consequences include traumatic fistula, a medical syndrome resulting from sexual violence that causes continuing urinary incontinence, leaving victims traumatized, shamed, and socially ostracized (Acquire Technical Update 2006). The victims’ feelings of helplessness and humiliation persist in the form of posttraumatic stress disorders long after the conflict has ended (Acquire Technical Update 2006).

Impunity

Despite the devastation caused by sexual violence, history records centuries of impunity for such acts committed during conflict. Historians

estimate that Russian soldiers raped nearly two million women in eastern Germany during World War II (Mandl 2001). Japanese occupiers raped, assaulted, or killed approximately 20,000 women in Nanjing during the first months of 1937. Japan also kept approximately 200,000 Korean and other women in sexual slavery from about 1931 to 1945 (Pritchard and Zaide 1981; Gardam and Jarvis 2001). Yet the charters for the international military tribunals for Germany and Japan that followed World War II did not explicitly include rape in their charges of crimes against humanity (Askin 1997, 163).

Following World War II, international criminal law's failure to recognize sexual violence as a crime left victims without redress or remedy. States continued to treat rape as "collateral damage" and the "spoils of war" (Primoratz 2007, 219). Véronique Zanetti (2007) writes that, "Not only was it not condemned with the same severity as other equivalent violations of rights, but it was long considered as a 'side effect' of war or even, more cynically, as a bonus to soldiers, regardless of allegiance" (44). Denial, neglect, allowance, instigation, organization, and cover-up all played their roles. Social science failed victims of sexual violence too: it provided neither sufficient data collection nor an adequate theoretical conceptualization to expose state responsibility for sexual victimization during international and internal conflicts. This is finally changing along with the laws of war.

In 1993 and 1994, the international criminal tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) explicitly included rape and sexual violence in their charters (see Statute of the International Criminal Tribunal for the Former Yugoslavia 1993; Statute of the International Criminal Tribunal for Rwanda 1994). After years of indifference, international criminal law began to recognize the social consequences of rape and sexual violence associated with conflicts. For example, intergroup sexual violence can be a means of controlling reproduction—a powerful physiological and sociological weapon used to destroy social groups. Rape can also be a means of absorbing and eliminating enemy populations.

The ICTR verdict in the *Akayesu* case in Rwanda, adjudicated by then-ICTR Justice Pillay, identified rape as "an integral part of the process of destruction" (*Prosecutor v. Akayesu* 1998, para. 731). The ICTY verdict in *Prosecutor v. Kunarac, Kovac & Vukovic* (2001, paras. 436, 542) also recognized rape as an element of crimes against humanity and established sexual enslavement as a war crime. *Akayesu* defined rape as a "physical invasion of a sexual nature, committed in circumstances which are coercive" (para. 688). The ICTY *Furundzija* case more restrictively defined rape in terms of human vaginal and anal penetration or penetration with objects, thereby facilitating the inclusion within the prosecution of rape acts perpetrated against both male and female victims (*Prosecutor v. Furundzija* 1998, para. 185).

Despite the ICTY and ICTR cases, states and international institutions still lagged in recognizing the role of state participation in and state

responsibility for protection from rape and sexual violence in conflict situations. The United States officially repudiated state-led sexual violence when it presented a resolution in October 2007 at the United Nations condemning government use of organized rape and sexual violence to achieve political or military objectives (Warren 2007). The response of other nation-states resulted in the temporary removal of references to government responsibility in the resolution (Agence France-Presse 2008). However, in June 2008, the UN Security Council finally adopted a follow-up resolution sponsored by the United States that *implied* the role of states. The resolution stated that “rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide.”⁸ The organizing role of governments in sexual violence during war making became more difficult to ignore.

Denial

Nonetheless, high officials such as Sudan’s President al-Bashir still unequivocally deny the occurrence of rape and sexual violence during both war and peacetime. President al-Bashir insisted in an internationally reported interview that rape *never* occurs in Darfur. According to al-Bashir, “It is not in the Sudanese culture or people of Darfur to rape. It doesn’t exist. We do not have it” (Curry 2007). President al-Bashir’s statements were strikingly similar to that of another head of state charged with war crimes: Saddam Hussein. When confronted with testimony about rape at his trial for the Anfal genocide in Iraq, Saddam Hussein told the Iraq High Tribunal (IHT) that he could not “sit down and remain silent when it’s said that an Iraqi woman was raped. . . . This couldn’t happen while Saddam Hussein is alive” (quoted in Wong 2006). In a significant sense, the IHT vindicated Hussein’s claims, because in spite of the evidence of rape and sexual violence heard in the *Anfal* trial, the IHT did not explicitly charge Saddam and his codefendants with rape (Global Justice Center 2007). Instead, the IHT’s general charges of the crime of torture subsumed the charges of rape (9–10). The failure of the IHT to explicitly charge rape against Hussein is significant because Iraq is a country where national courts still legally and socially marginalize rape victims, likening them to offenders for “dishonoring” their families and even the perpetrators of the crime (2).

This kind of legal neglect—if not outright denial—of rape continues in many traditional legal systems. Researchers have not yet challenged these

8. S.C. Res. 1820 (2008, para. 3) (S.C. Res. 1820, UN Doc. S/RES/1820 (June 19, 2008)); see also S.C. Res. 1888 (2009), reaffirming S.C. Res. 1820 and noting the need for greater state involvement in implementing the resolution (S.C. Res. 1888, UN Doc S/RES/1888 (September 30, 2009)).

denials with enough quantitative studies of rape and sexual violence in conflict zones. As noted by Prosecutor Moreno-Ocampo and High Commissioner Pillay, it is difficult to systematically record and analyze sexual violence, especially in conflict zones and repressive regimes. Although even a small amount of sexual violence creates widespread havoc that disrupts and displaces households and communities, the societal taboos and shaming that often surround rape and sexual violence also effectively suppress its reporting.

Obstacles to Research

Ideally, in order to break through these public and legal denials, social scientists would use a population-based random sampling of communities that incorporates self-reports of the respondents' own sexual victimization to provide the foundation for the study of sexual violence in conflict settings. However, the large-scale displacement of population groups by attackers in conflict situations makes ordinary household probability sampling misleading. Instead, much more targeted samples are required. For example, systematic quantitative analysis of mortality has been conducted using survey data collected in special high-risk settings, such as displacement and refugee camps (Hagan and Palloni 2006, 1578–79; Hagan and Rymond-Richmond 2008, 889). These analyses demonstrate that in the rare instances where specific survey questions reveal rape, the prevalence of reports among women is as high as 7 percent (Amowitz et al. 2002, 520). An important aspect of rape is its capacity to terrorize a population.⁹

Societal taboos and stigma in Arab and Muslim culture further restrict reporting of sexual victimization. In postinvasion Iraq, Lynn Amowitz led a systematic household survey in three highly affected southern cities (Amowitz et al. 2004). Only four of 1,057 survey respondents reported a preinvasion regime-related rape or sexual assault involving an extended family member since 1991 (1475). Displacement of many of the victims and normative concerns about family honor likely suppressed truthful responses (1476). When Amowitz and her colleagues reframed the question to include rape or sexual assault involving community members, beyond and without attribution of family membership, eighty-seven respondents reported rapes (1474). These findings encourage a new focus on the larger community, while earlier work in displacement and refugee camps encourages sampling in concentrated populations of human rights victims. Despite the potential obstacles and regardless of the tools ultimately used, it is clear that social science has a particular role in identifying sexual violence committed during conflict.

9. See the discussion of rape as an instrument of terror in Hagan 2003 (199–200).

III. A NEW APPROACH

Research conducted by John Hagan, Alberto Palloni, and Wenona Rymond-Richmond—published in *Science*, the *American Journal of Public Health*, the *American Sociological Review*, and *Darfur and the Crime of Genocide*—sought to build on these lessons of the past (Hagan and Palloni 2006; Hagan and Rymond-Richmond 2008, 2009; Hagan, Rymond-Richmond, and Palloni 2009). Here, the authors bring together the core findings of this research to set a social science foundation for the development of reasonable grounds evidence of rape and sexual violence as support for charges of crimes against humanity and genocide in Darfur.

As noted, previous survey research encourages moving beyond the reported rape of respondents themselves to reports of rape in the larger communities from which they come. The predictable legal objection to evidence regarding the reported rape of others is its hearsay aspect. The similar concern from the social science perspective is the reliability and validity of these secondhand reports. However, international criminal law allows hearsay evidence and provides special accommodations to ensure the anonymity and confidentiality of witnesses.¹⁰ Social science in this case involved the use of an HLM methodology, which allows for the cross-validation of aggregated respondent reports (for example, in villages or settlements) while also taking into account individual-level sources of variation and bias (Raudenbush and Bryk 2002). In the following pages, we summarize our use of this method to analyze central tendencies in the aggregation and concentration of the ADS reports of sexual attacks at the community or settlement level in Darfur.¹¹

Building the Darfur Case

We conceive the mass atrocities in Darfur as follows: the leadership of the government of Sudan knowingly allowed a racially targeted outbreak of

10. Hearsay evidence is generally admissible in ICC cases, but judges may exclude hearsay evidence if they believe it is unreliable. The reliability of hearsay evidence is evaluated on an item-by-item basis. In addition, victims of sexual violence receive heightened protection under ICC procedural rules (see International Criminal Court 2002).

11. The previous survey work on violence in displacement and refugee camps also encourages data collection in concentrated human rights victim populations, where rape and sexual violence are likely to be more common. The World Health Organization conducted previous work with the Sudanese Ministry of Health in internal displacement camps in Darfur and focused on mortality resulting from disease and malnutrition. The foundation for this work was focused on mortality in “complex humanitarian emergencies.” The researchers did not consider violence resulting from attacks on settlements in Darfur. In order to focus on the mass atrocities, including sexual violence, involved in these attacks, it was necessary to conduct the research with refugees outside Darfur. This is one reason why the US State Department, in cooperation with the Coalition for International Justice, collected the ADS data across the border from Darfur in Chad.

violence to emerge and escalate between the Arab and black African groups in Darfur, which resulted in rapes and sexual violence during the murder, destruction, and displacement of those black African groups. Although documentary evidence thus far is limited, in this article we link this scarce evidence to the social science evidence indicating that there was superior responsibility—and therefore participation—from the highest levels of the Sudanese government. The data show coordinated and racially targeted attacks on black African farms and villages by the GoS military forces acting in cooperation with Arab Janjaweed militias. As one refugee responding to the survey reported, “They come together, they fight together, and they leave together” (US Department of State 2004).

Prosecutor Moreno-Ocampo identified three individuals—President al-Bashir, former Deputy Minister of the Interior Ahmad Harun, and the militia leader Ali Kushayb—as joint participants in the mass atrocities in Darfur (Julie Flint, quoted in Hagan and Raymond-Richmond 2009, 116.). In addition to these individuals, Figure 1 names three other militia leaders identified in the ADS data who participated in mass atrocities in connection with Deputy Minister Harun. This chain of command is evidenced by the documentation and analysis of the US State Department survey of refugees in

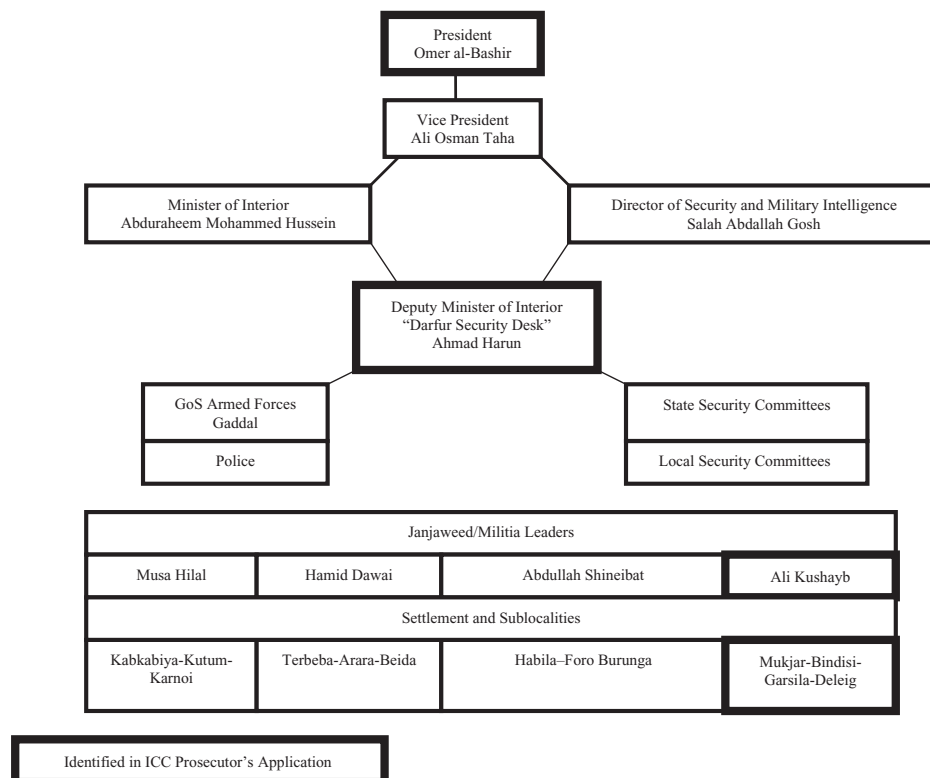


FIGURE 1.
Sudan-Darfur Chain of Command, 2003–2004

Chad (the ADS), which we discuss later in this article. “This brings us,” High Commissioner Pillay (2009a; also in this symposium) observed,

to the concept of the duty of enquiry that lies with anyone in a superior position, military or civilian, who knew or had reason to know that crimes were being perpetrated or about to be committed, and failed to take necessary and reasonable measures to prevent them and to punish those responsible.

This also raises the question, what level of evidence is required to advance an investigation and proceed to a lawful arrest pursuant to that duty of inquiry?

We do not assert that the evidence presented in this article necessarily rises to the level of “substantial grounds to believe” that President al-Bashir committed the crime of genocide or that the evidence reaches the even higher standard of “beyond reasonable doubt” required for a conviction. As the Appeals Chamber recently held, these higher thresholds constitute “an erroneous standard of proof” at the pretrial investigation and arrest stage (*Prosecutor v. Al Bashir* 2010). Instead, we focus on the reasonable grounds standard, as explained by the Appeals Chamber. This standard does not require that there be “absolute certainty that the evidence exclude all hypotheses inconsistent with the requisite statutory elements of the alleged crime”—if it did, the “lower threshold of ‘reasonable grounds’ would be meaningless” (para. 12). As such, the kinds of testable hypotheses and social science evidence presented in this article are aimed at furthering reasonable grounds evidence that will support the determination that President al-Bashir committed the crime of genocide.¹²

The ADS Sample and Interviews

In June 2004, the Sudan government was on notice that the United States was observing and recording its coordinated attacks on villages in Darfur with satellite and aerial imagery (Amarelo 2004). Although these attacks were, at a minimum, signs of ethnic cleansing (if not outright genocide), US officials cautioned “that the images are not hard evidence until they are corroborated by testimony of witnesses on the ground” (Amarelo 2004). Therefore, during the following July and August, the US State Department, at the direction of then-Secretary of State Colin Powell, fielded the Atrocities Documentation Survey. The ADS was a survey of 1,136 refugees who witnessed and experienced attacks in Darfur but were now living in Chad.

12. The Appeals Chamber made clear that under the Rome Statute such evidence is a prerequisite for al-Bashir’s lawful arrest or detention. Indeed, at the earlier investigation stage, the Appeals Chamber cites the prosecutor in its decision as making the crucial point that requiring the higher trial standard of proof beyond reasonable doubt might actually endanger witnesses (see *Prosecutor v. Al Bashir* 2010, paras. 10, 18).

An eight-page summary of the ADS, which included a table of descriptive statistics and maps, formed the background for Secretary of State Powell's testimony on September 9, 2004, to the US Senate Foreign Relations Committee stating that genocide was occurring in Darfur (US Department of State 2004). This summary report, however, was only the first step. We report next how we have used the ADS to document and analyze rape and sexual violence in Darfur. The point is to illustrate how a social scientific analysis of these mass atrocities involving rape and sexual violence can establish a foundation for reasonable grounds evidence of genocide.

The US State Department contracted with the Coalition for International Justice to conduct the ADS from July 12 through August 18, 2004. The ADS used a randomized multistage probability sample of 1,136 Darfuri refugees in twenty sites in Chad. The United Nations used lettered grids to divide refugee camps into sectors, each led by a recognized chief, *umda*, sheikh, or other leadership figure.¹³ The ADS team identified all sectors of all camps and proportionately sampled them by size and ethnicity. The team similarly sampled informal villages by using landmarks as sector boundaries. Interviewers set out on random routes from the leaders' households and selected every tenth occupied space in each sector. Using a Kish grid,¹⁴ a team member randomly selected an adult to interview in each fully enumerated household (US Department of State 2004).

The State Department's Bureau of Intelligence and Research developed the questionnaire used by the ADS team with input on the victim and perpetrator crime codes from international law advisors (US Department of State 2004). Using cartographers and translators, interviewers located 90 percent of the villages from which refugees had fled. We thus located 932 respondents clustered in twenty-two originating village clusters (referred to here as villages) with fifteen or more respondents each. Population pyramids from this refugee sample and samples from displacement camps inside Darfur are similar with regard to age and gender composition (US Department of State 2004). In both Chad and Darfur, there is a disproportionate absence of fighting-age men (eighteen to twenty-nine years of age), which increases the average age of respondents (US Department of State 2004). There are no indications the Chadian refugees differ in significant ways from internally displaced Darfurians in the bordering areas.¹⁵

13. An *umda* is a community leader in Darfuri culture.

14. A Kish grid lists individuals within a sampling unit (e.g., family) to equalize chances of selection.

15. We can note several possible limitations of the data. First, the interviewers did not speak the languages of the Darfuri refugees, so interpreters were required. However, the interpreters contributed to the study in an important way: they greeted and introduced interviewers to the refugees, using knowledge of local customs and rules of etiquette to establish trust. The investigators expressed high satisfaction with the interpreters' work.

The ADS data uniquely and extensively documented victimization during the attacks on black African settlements in Darfur. We know of only one other systematic quantitative study of precamp violence in Darfur, and none that includes sexual violence (Deportere et al. 2004). As part of the ADS survey, interviewers asked refugees, (1) when, how, and why they had left Darfur, and (2) if, when, how, and by whom they, their families, or their fellow villagers had been harmed since the beginning of the conflict approximately eighteen months earlier (US Department of State 2004). The survey's structure mixed the closed-ended format of health and crime victimization surveys with the semistructured format of legal witness statements. We cross-checked and supplemented the ADS data by rereading and recoding the extensive narratives recorded in the interviews.

The ADS refugee sample, as introduced previously and as documented in Table 1, provides a descriptive picture of the results of attacks on farms and villages in Darfur. About 40 percent of the ADS respondents are male and are, on average, thirty-seven years old (Hagan and Rymond-Richmond 2008, 93). Female refugees probably outnumber males in Darfur because males are more likely to be killed, while females are more likely to be raped and survive, at least in a physical sense. Just over half of the Africans in the sample self-identified as Zaghawa, approximately a quarter as Masaleit, and about 5 percent each as Fur and Jebel (173). The largest concentrations of the Zaghawa fled from North Darfur, while most of the Masaleit and Fur fled from West Darfur, with the Jebel previously concentrated in one town, Seleya, in West Darfur (173). The identification of the groups is important in establishing the protected status of the victims of the atrocities.

We read and coded each narrative to designate the attacking group as Janjaweed, Sudanese, or combined Sudanese and Janjaweed forces. We distinguished GoS forces and Janjaweed militia by their clothing and equipment. About two-thirds of the attacks were joint Sudanese and Janjaweed operations, nearly a fifth of the attacks involved Sudanese forces acting alone (usually in bombing attacks), and about one-tenth involved the Janjaweed alone (173). The remaining 10 percent of cases are uncategorized and were used as a comparison group in some of our analyses (173). The documentation of when the attacks included Sudanese military forces is important to establishing the responsibility of Sudanese government leadership in the mass atrocities.

Second, shared method bias may result from reporting by respondents of both predictor variables and sexual violence outcomes. However, aggregated reports of sexual violence across villages yielded highly reliable reporting. We also controlled for the respondents' reports of their own sexual victimization to minimize potential common sources of bias and heterogeneity.

Third, an indirect survey of Darfuri villagers who fled from Sudan could introduce selectivity bias. Yet the Chad survey displays demographics similar to those from Sudanese camp surveys. The refugee survey allows for questions about sexual victimization unasked in the camps. An adjustment for months since the respondents' flight to Chad is a partial control for selectivity.

TABLE 1.
Individual- and Settlement-Level Profiles, Atrocities Documentation Survey, Darfur Refugees, July–August 2004

Individual-Level Characteristics	Mean	SD
<i>Respondent Attributes</i>		
Mean age	37.100 years	14.634
Male	.400	.491
<i>African Group Membership</i>		
Zaghawa	.527	.550
Fur	.055	.288
Masaleit	.275	.447
Others (Reference Group)	.143	.330
<i>Attacking Groups</i>		
GoS or Janjaweed (Reference Group)	.328	.345
GoS and Janjaweed Militia	.672	.470
<i>Ethnic Protection</i>		
Reported Arab Villages Spared	.063	.244
<i>Racial Targeting</i>		
Heard Racial Epithets	.343	.475
<i>Reported Sexual Victimization</i>		
Reported Own Victimization	.040	.205
Reported Victimization of Others	1.184	2.539
<i>Village-Level Characteristics</i>		
<i>Racial Intention</i>		
Mean Racial Epithets Heard	.312	.144

Abbreviations: GoS, Government of Sudan Forces.

Note: N = 932 individuals (level-1) in twenty-two village clusters (level-2).

Data are expressed as percentage of respondents unless otherwise indicated.

During the second two-week period of the ADS interviews, a question was added asking if there were rebels actually staying in the respondent's town or village (US Department of State 2004). Less than 2 percent of the respondents in the sample reported a rebel presence (US Department of State 2004). Reports of rebels were disproportionately located in several northern settlements, such as Karnoi, near Tine, and Girgira, where the rebel presence was still reported to be low, but ranging from 6 to 13 percent (US Department of State 2004). The documentation of rebel involvement in the settlements that were attacked is important to refuting the Sudanese government's defense that it was acting in proportionate self-defense against an organized insurgency (de Waal 2004).¹⁶

16. For a discussion of the idea that the attacks in Darfur, analyzed in this research, were coordinated in response to an organized insurgency, see de Waal (2004).

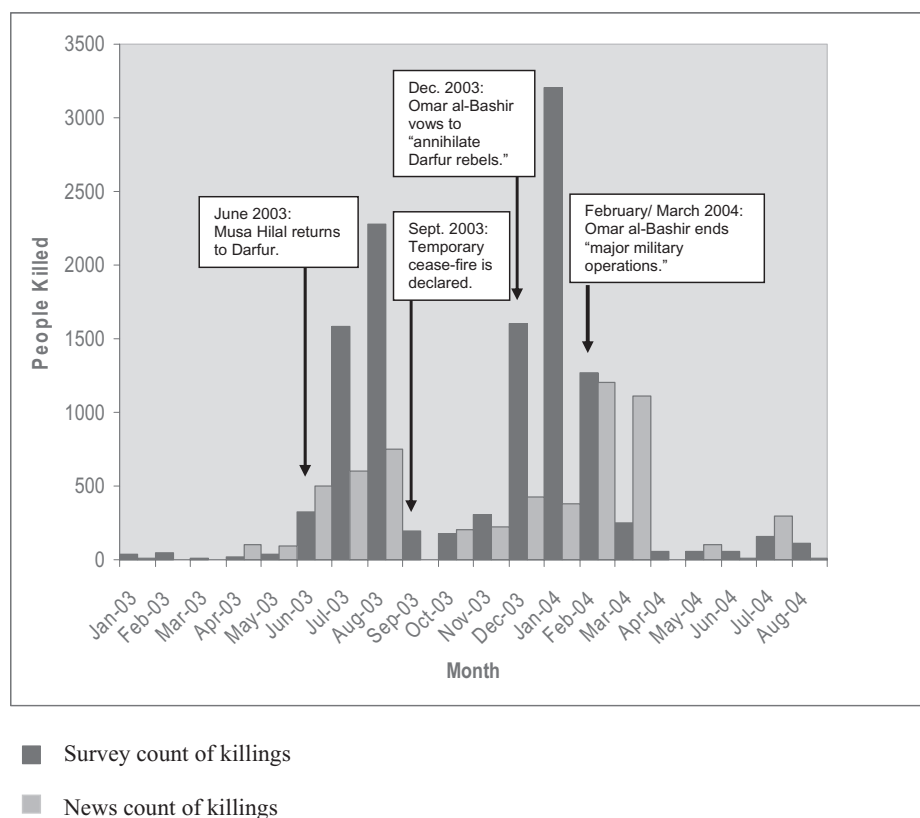


FIGURE 2.

Chronology of Key Events and Monthly Death Count Estimates from Survey and News Counts of Killings, January 2003–September 2004

There were two waves of attacks in Darfur, and these predictably corresponded with the peak periods involving violent and health-related death and displacement. About a quarter of the sample fled during the first three months of the first wave of attacks, about half fled during the four months of the second wave of attacks, and the remaining quarter fled during the other thirteen months (Hagan and Rymond-Richmond 2008, 173). The second wave of attacks was obviously the most costly in terms of the physical destruction of the group conditions of social life for black Africans in Darfur. It was during the second wave of attacks, in December 2003, that President al-Bashir vowed to “annihilate Darfur rebels” (see Agence France-Presse 2003; Hagan and Rymond-Richmond 2009, 139–40). Figure 2 shows monthly death counts from January 2003 to August 2004, which encompasses the two waves of attacks as well as the months before and after. The two sources of death counts are the ADS interviews and a separate survey based on news and nongovernmental organization reports of deaths in attacks on 101 villages (Petersen and Tullin 2005). The parallel patterns in the two studies provide a source of convergent validation for the data collection in both research efforts.

There are more than a dozen frequently cited estimates of the death toll in Darfur (Degomme and Guha-Sapir 2010). Prosecutor Moreno-Ocampo estimated that 35,000 African villagers were killed outright in Darfur and that 100,000 died overall (Situation in Darfur 2008, 7). The higher estimate includes deaths from disease and malnutrition associated with forced displacement following from the attacks. *Science* and the *Lancet* published peer-reviewed lower- to upper-bound confidence interval estimates of Darfur mortality from the conflict in the range of 170,000 to 255,000 and 178,000 to 461,520, respectively.¹⁷ Although President al-Bashir and the Sudanese government estimate that 9,000 have died in Darfur, there is a reasonable basis to believe that the total is over 100,000. And there is a growing convergence based on the research literature outlined here on estimates of approximately 300,000 deaths (Hagan and Raymond-Richmond 2009, 102).

The Reporting of Racial Epithets

The ADS interviews are highly detailed in recording the shouting of racial epithets, our measure of racially targeted intent, during the attacks (US Department of State 2004). The epithets are important, in part, because they provide evidence of explicit targeting that focused the attacks in a way that went beyond the multiple ethnic tribal identities indigenous to Darfur (i.e., the Zaghawa, Fur, and Masaleit). The effect of these epithets was to identify an explicit binary racial division. As we see next, although both ethnic and racial groups are protected under the Genocide Conventions, ethnic attributions are more easily dismissed as subjectively and internally adopted by the groups themselves (UN International Commission of Inquiry 2005).

The UN International Commission of Inquiry on Darfur approached the distinction between subjective and objective identity as an important issue of atrocity law. This is an example of how David Scheffer (2006, 229) argues that the exclusively legal framing of such issues can inhibit parties from acting on their responsibility to investigate and protect against attacks on victimized groups. The Commission of Inquiry concluded that victims of violence in Darfur were not *objectively distinct* from their attackers and therefore were not recognizable as protected ethnic or racial groups under the Genocide Convention:

The various tribes that have been the objects of attacks and killings (chiefly the Fur, Massaleit [sic] and Zaghawa tribes) do not appear to

17. Compare Hagan and Palloni (2006, 1578–79), estimating deaths in the range of 170,000 to 255,000, with Degomme and Guha-Sapir (2010, 298), estimating deaths in the range of 178,000 to 461,520.

make up ethnic groups distinct from the ethnic group to which persons or militias that attack them belong. They speak the same language (Arabic) and embrace the same religion (Muslim). In addition, also due to the measure of intermarriage, they can hardly be distinguished in their outward physical appearance from the members of tribes that allegedly attacked them. (UN International Commission of Inquiry 2005, para. 129)

The commission failed to acknowledge that racial distinctions are often socially constructed and forcefully imposed with little regard to actual physical differences. Racial epithets are important for both criminological and legal analysis because they capture the motivation and intent of attackers. The frequently quoted *Akayesu* decision in Rwanda and the *Jelisić* decision in Bosnia both emphasize the importance of spoken language in documenting genocide (*Prosecutor v. Akayesu* 1998; *Prosecutor v. Goran Jelisić* 1999). Social science evidence regarding the influence of racial epithets is shown later in this article to have an important bearing on violence and genocidal intent in Darfur.

We examined the narrative accounts of the attacks on a case-by-case basis to find reports of victims and refugees hearing racial epithets. We recorded the content of the epithets, detailing as accurately as possible the wording of the epithets. Each surveyed individual was assigned a code indicating whether or not he or she heard racial epithets. We argue that the racial epithets combine elements of motivation and intent and that they were raised to compelling collective levels in the village settings where they were most frequently heard.

Refugees often reported hearing their attackers shouting racial slurs such as “This is the last day for blacks,” “We will destroy the black-skinned people,” “Kill all the slaves,” “Kill all the blacks,” “You are black, you deserve to be tortured like this,” and “We will kill any slaves we find and cut off their heads” (US Department of State 2004). The mixture of ethnic and racial markers in the expressed motivations for the sexual violence during the attacks is illustrated in the additional ADS reports of the speech used during the attacks. The surveys noted the following statements indicating violent action based on ethnic and racial motivations:

- “Masalit [sic]—you are dirty; you deserve to be raped. You are black—you deserve to be tortured like this.”
- Janjaweed said to women they raped after cutting their arms to brand them, “You are now Arab wives. There are no men here.”
- In August, some women returned and were raped by Arabs, who said to them, “You will have Arab babies.”
- Arabs said that they would kill as many Masaleit as they could and that the rest would never live there again. They also said, “We will take your women and make them ours. We will change the race.”

- Ten men raped a black African woman and said, “You are black people’s wives and you bear black children but now you have to bear white people’s children” (US Department of State 2004).

These words and phrases shouted by the perpetrators of sexual violence provide insight regarding the attackers’ motivation and intentions during the raids on Darfuri villagers.

We used village-level proportions of respondents hearing racial epithets to measure the aggregation and concentration of racial targeting. These scores ranged from 0 to 50.2 percent, indicating wide variation across villages. We shorten the reference to “collective racial intent” in the following pages, but it is noteworthy that both motivation and intent are involved in the reported racial epithets. We also include as a further measure of the “us-versus-them” dynamic of ethnic cleansing the respondents’ reports of nearby Arab villages being spared from attacks.

Figure 3 presents a bar graph based on a three-month moving average of refugees from Darfur surveyed in the ADS who reported hearing racial epithets during attacks. The dating indicates when, according to the refugees, they departed from their farms and villages in Darfur. The upward ascent in respondents’ reports of hearing racial epithets begins in June 2003, the month when Musa Hilal returned to Darfur after a period of detention elsewhere (Flint and de Waal 2005, 98).¹⁸

This is also the time period during which the Office of the Prosecutor indicates Deputy Minister Harun visited Darfur numerous times to lead a major recruitment drive with local leaders such as Hilal (Situation in Darfur 2007, paras. 47, 122). Harun spoke at meetings across Darfur, repeating the message that he held the power “to kill or forgive whoever [sic]” he wanted and that he possessed the authority “to kill three-quarters of Darfur in order to allow one quarter to live” (para. 30). The Office of the Prosecutor reports the testimony of a witness about a specific July 2003 speech in Al Geneina: “On that day, Harun’s speech was preceded by that of the notorious Militia/Janjaweed leader Musa Hilal. Hilal’s speech was characterized by the witness who heard it as ‘very racist.’ Hilal was enthusiastic about unifying to fight the enemy and characterized the conflict as ‘holy war’” (para. 30).

Enumerating Sexual Violence and Mass Atrocities

The final pieces of our descriptive portrait from the ADS sample consist of the reports of mass atrocities. The classical understanding of genocide

18. Flint and de Waal (2005) explain that in June 2003, Hilal flew back to Darfur and organized the Janjaweed with government support, reportedly as a result of the intervention of Vice President Ali Osman Taha.

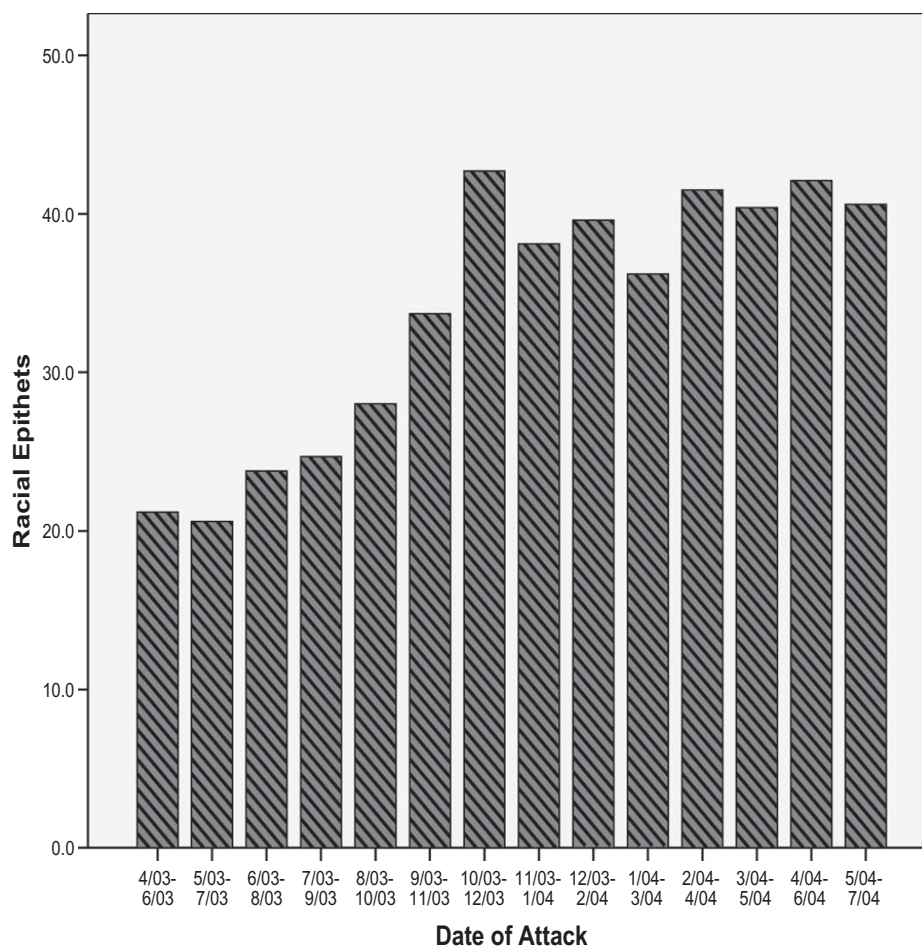


FIGURE 3.

Percentage of Refugees Who Reported Hearing Racial Epithets during Attacks, by Date of Departure, Atrocities Documentation Survey, Summer 2004

emphasizes the intentional taking of lives that characterizes the destruction of a group.¹⁹ A more contemporary approach to genocide also focuses on the deliberate infliction of conditions of life on a group calculated to bring about its destruction.

Both the taking of lives and the conditions of life are crucial components of the Genocide Convention's definition of what constitutes genocide. According to Article II of the Genocide Convention, genocide consists of

19. The classical focus in defining genocide on loss of life likely derives from the massive mortality during the Holocaust and from the customary importance attached to human life in common law.

any of the following five acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group:

1. killing members of the group;
2. causing serious bodily or mental harm to members of the group;
3. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
4. imposing measures intended to prevent births within the group; or
5. forcibly transferring children of the group to another group. (Convention on the Prevention and Punishment of the Crime of Genocide 1948)

Any one of the five specified elements can legally constitute genocide. The third act, with its reference to “group conditions of life,” is perhaps the most all-encompassing element and the most meaningful for understanding how genocidal violence denies sustainable life to entire villages, communities, or populations. There is little doubt that sexual violence can undermine conditions of group life and lead to the destruction of that group.

Our measurement approach involved using a report section from each survey that recorded incidents of victimization. Respondents reported attacks on themselves, their families, and their settlements, which involved bombing, killing, rape, abduction, assault, property destruction, and theft. Each respondent therefore reported for him- or herself together with his or her settlement. Our most specific interest was in systematic counts of the number of sexual attacks reported by the respondents. However, for comparative purposes, we also created a total victimization severity score, which we describe first based on the common law seriousness of the incidents reported for attacks on the settlements. High Commissioner Pillay (2009a; also in this symposium) noted the importance of measuring the link between the sexual violence and other mass atrocities when she observed: “The case law of the tribunals has given us direction as to how to conduct investigations. We know that commanders have been found responsible for the ‘incidental murders and rapes’ that were deemed to be the ‘natural and foreseeable consequences of an ethnic cleansing campaign’.”

We aggregated reports of specific incidents experienced or witnessed by each respondent in the settlement. To create the total victimization score, we assigned the following values to the incidents: 5 to reported killings, 4 to sexual attacks, 3 to assaults, 2 to property destruction or theft, and 1 to displacement.

To illustrate the coding of the incidents in the severity scale, consider the example of a thirty-five-year-old Masaleit woman with a total severity score of 52. The attack reported by this woman occurred in a village near Masteri. Sudanese government troops and Arab Janjaweed militia attacked her village on September 1, 2003. She reported twenty incidents during the attack that occurred that day. Her report pertains to herself, her family, and others in the village. During the attack, she was beaten (severity score of 3)

and raped (4). Her father was severely beaten (3) while trying to protect her, and he was subsequently abducted (4). Some women from her village were abducted (4) and held for two hours. They were beaten (3) and raped (4) before being released. Another group of women ranging in age from sixteen to twenty were raped (4), and she personally witnessed one of the rapes and heard about the rapes from other victims (4). Additional villagers, including her brother, were beaten (3), shot (3), and stabbed (3). She witnessed dead bodies (5), all male, some of which had their throats cut, and others that had been shot in the head. Her village was completely destroyed (2) except for three huts that were on the far edge of the village. Theft occurred (2), including that of livestock, food, and water pots. She reported that there was no rebel activity in or around her village. The only defense the villagers had was a few spears, which were no match for the attackers' guns, knives, pickup trucks with mounted guns, and aircraft. She entered Chad in February 2004, becoming one of the two to three million Darfurians displaced (1) by the mass atrocities.

We defined sexual victimization as including rape, sexual assault, acts of sexual molestation such as insertion of foreign objects into the genital opening or anus, and sexual slavery. Four percent of the full sample and 7 percent of women refugees reported having been victimized.²⁰ Nearly a third of the Darfuri refugees (29.1 percent) indicated that other villagers were sexually victimized during attacks. Others' sexual victimization is coded from one to ten other persons victimized, with a mean of 1.18. As noted previously, the sexual victimization of others is our ultimate outcome variable, while we used self-reports of sexual victimization of the respondent as a control variable for unmeasured heterogeneity or reporting bias. Map 1 indicates that sexual violence was most common in West Darfuri villages, where Fur and Masaleit tribal groups were concentrated. This map further reveals that the villages ranking highest in reports of sexual violence were also usually the same villages ranking highest in total victimization, which included killings as well as other forms of physical and sexual violence. This overlapping of sexual and other forms of violence is consistent with the finding in the ICTR *Akayesu* case in Rwanda. The *Akayesu* case found that rape is "an integral part of the process of destruction" (*Prosecutor v. Akayesu* 1998). The ICTY *Kunarac, Kovac & Vukovic* case (2001) also recognized rape as part of crimes against humanity.

IV. APPLYING AN APPROPRIATE ANALYTIC METHOD

The HLM methodology designed for multilevel clustered samples (Raudenbush and Bryk 2002) was then used to analyze the data. HLM allows

20. The latter figure approximates reporting of sexual assaults in Sierra Leone (see Amowitz et al. 2002, 518).

analysis within and between villages. We analyzed the combined roles of GoS forces with Janjaweed militias in the racial targeting of sexual violence—as well as in the sparing of Arab villages—in an “us-versus-them” dynamic of targeted violence and ethnic cleansing.

First we used a logistic regression to model binary reports of whether individuals heard racial epithets during the attacks. Then we estimated joined individual- and village-level Poisson regression equations of the sexual victimization of others (adjusted for dispersion, months of exposure before flight, and the respondent’s own sexual victimization).²¹ The dependent variable, sexual victimization, is the count of the number of *other* persons reported by each individual in the village to have been sexually attacked, as described here. HLM allows simultaneous analysis of outcomes within and between villages. Thus, our within-village Poisson model first regresses the individual-level reports of sexual victimization by the 932 respondents on their individual reports of racial epithets and other independent variables defined in the following pages. Our between-village Poisson model then regresses the average sexual victimization scores for the twenty-two villages—after the individual-level variables are taken into account—on the proportion of the respondents who report they heard racial epithets in each village. The averaging of victimization scores within villages allows us to avoid overcounting overlapping reports.²²

Poisson models assume independence of the modeled events. Reports of the sexual victimization of others could be viewed as problematic, as hearsay evidence, and as well be dependent on the respondents’ own sexual victimization. To minimize such dependence and the violation of this assumption, we include in our Poisson model of the sexual victimization of others an independent variable that is the individual’s own report of being sexually victimized.

We learn from this joint analysis not only about individual sources of reported sexual victimization in Darfur, but also about the influence of aggregate differences in the distribution of racial epithets between villages on sexual victimization, with individual-level variables controlled. We ultimately show in Map 1 how these joint GoS and Janjaweed

21. Poisson regression is a kind of regression analysis that is most often used to analyze data that takes the form of counts, in this case counts of rape and sexual assault.

22. The equations for the hierarchical Poisson model are as follows:

$$\ln \lambda_{ij} = \beta_{0j} + \sum_k \beta_{kj} X_{kji} + \epsilon_{ji}$$

$$\beta_{0j} = \pi_{00} + \pi_{01} Y_j + \delta_j$$

where λ_{ij} is the rate of sexual victimization of others reported by individual i in settlement j , β_{kj} ’s are regression coefficients for variables k in settlement j , X_{kji} is individual-level covariates, Y_j represents the proportion of individuals in settlement j who heard racial epithets, π_{00} is a constant term for the entire sample, π_{01} is the effect associated with the proportion hearing racial epithets, and ϵ_{ji} and δ_j are Poisson and normally distributed errors.

attacks are associated with aggregated and concentrated racial intent at the village level in the prediction of sexual victimization in Darfur. We also include on this map a parallel indication of total victimization scores.

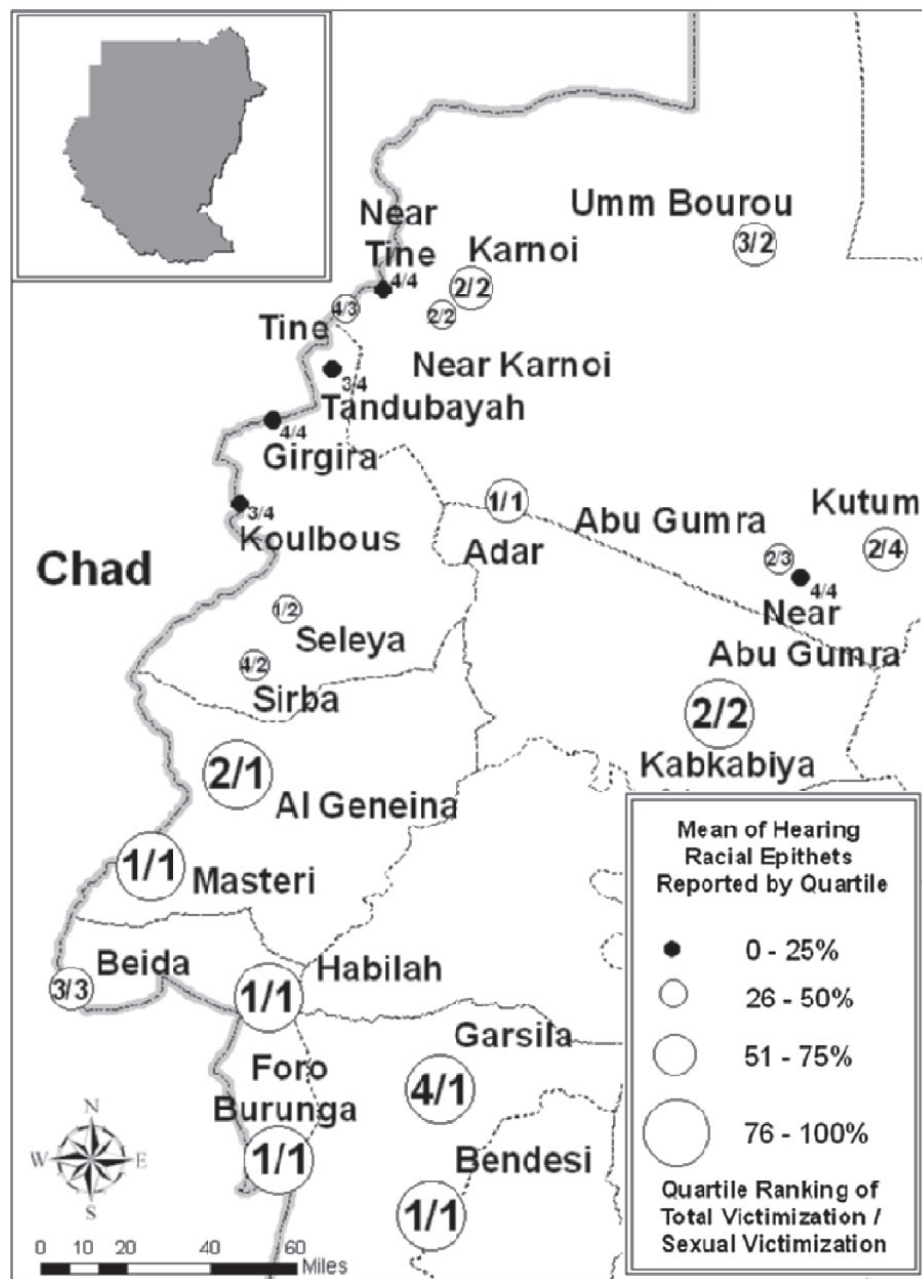
The models we estimate thus consider the following: (1) whether ethnic group members of the Fur, Masaleit, and Zaghawa tribes more often report hearing racial epithets during attacks, our indicator of intent to victimize a protected group; (2) whether the joining of government and nongovernment forces in attacks, and the sparing of nearby Arab villages, further predicts reports of hearing racial epithets; (3) whether reports of hearing racial epithets are unequally distributed across villages and whether this is an important determinant of the effects epithets have on reported sexual violence; and (4) whether joined government and nongovernment attacks in conjunction with higher prevalence of racial epithets at the village level predict higher rates of sexual victimization.

The HLM reliability score resulting from the partitioning of the variance of others' sexual victimization within and between villages is 0.906, indicating precision at the village level. This high score not only speaks to but should almost completely eliminate concerns about the unreliability of the hearsay nature of the ADS evidence of sexual victimization. The surveys analyzed here are therefore strong elements of the new type of social science evidence called for by Prosecutor Moreno-Ocampo and High Commissioner Pillay.

Mapping the Racial Targeting

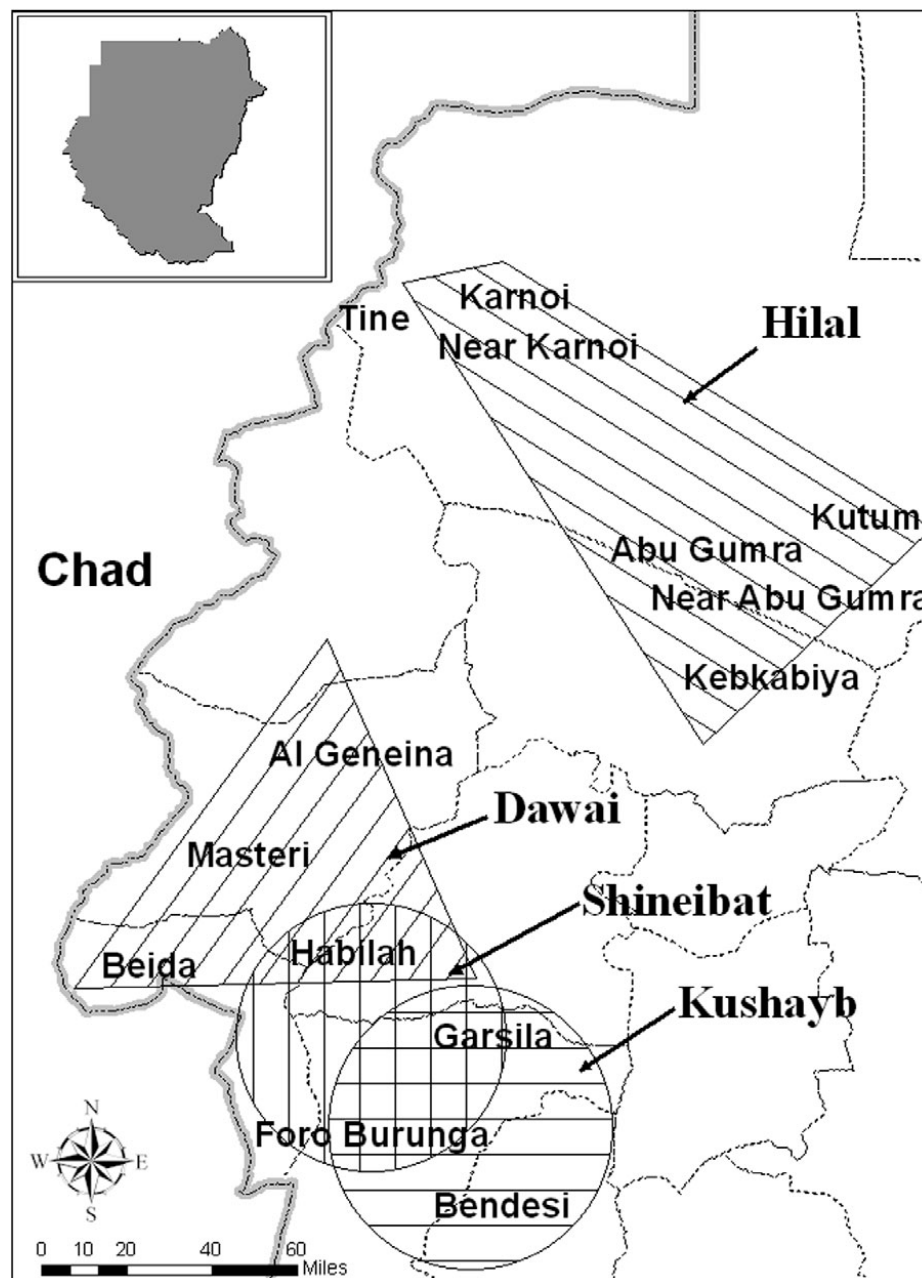
We can summarize important aspects of our analysis on two maps. We begin with the distribution of the racial epithets heard during attacks by the ADS respondents. First, we consider how the reporting of these epithets varies across the *settlements*—that is, we answer the question, “*where* were these epithets heard most often?” Second, we consider how racial epithets are distributed in terms of the characteristics of the *individuals* who heard them—that is, we answer the question, “*who* heard these epithets most often?”

Map 1 portrays the variation in reported racial epithets across the settlements. It indicates variation in the proportion of respondents reporting epithets with circles of increasing sizes (calibrated in quartiles) in the settlements. About half of the respondents in the top quartile heard racial epithets during the attacks. Thus, 45 percent of the respondents heard racial epithets in Kabkabiya, where early attacks are reported to have included Musa Hilal, and 43 to 50 percent of respondents heard these epithets in settlements in southwestern Darfur—in Al Geneina, Masteri, Habilah, Garsila, Foro



MAP 1.
Total Victimization and Sexual Victimization, with Percentage of Persons Hearing Racial Epithets

Burunga, and Bendesi—the sites of attacks reported in the media and in the ADS data to have been led by three other Janjaweed militia leaders. These sites in southwestern Darfur are in the more fertile and densely settled areas of Darfur.



MAP 2.
Janjaweed Militia Leaders' Areas of Operation

Map 2 outlines the locations where news media and human rights groups reported attacks that were led by four militia leaders—Musa Hilal, Hamid Dawai, Ali Kushayb, and Abdullah Shineibat. We designate the approximate areas of these leaders' operations on Map 2. These are also the areas with a high number of reports of racial epithets and attacks in Map 1.

Modeling the Racial Epithets

Table 2 presents a logistic regression model of respondents hearing racial epithets during attacks. The model indicates men were more likely than women to hear epithets. Nearly three-quarters (72.8 percent) of the women refugees had no schooling, and less than 5 percent (4.5 percent) had attended Islamic school, while just over one-third (35.6 percent) of men refugees had no schooling, and more than a quarter (26.0 percent) had attended Islamic school. Men were thus more likely to understand and report racial epithets shouted in Arabic.

The model further indicates that the Fur, Masaleit, and Zaghawa were also more likely than others to hear the racial epithets. The Zaghawa experienced more bombing than ground attacks, which may explain why they were somewhat less likely than the other targeted groups to report hearing racial epithets. Much attention has been paid to the specific targeting of the Fur in Darfur. An additional finding of the model is that respondents who reported that nearby Arab villages were spared also were more likely to report hearing racial epithets. The final important finding in the model is that racial epithets were more likely to be heard during *joint* Sudanese government and Janjaweed attacks, suggesting government involvement in elevating the racial epithets.

It is possible that the combined forces shouted the epithets in several languages, thereby increasing the likelihood that racial epithets would be understood by respondents. Yet this could account neither for an effect of

TABLE 2.
Logistic Regression Model of Racial Epithets Heard, Atrocities Documentation Survey, Darfur Refugees, July–August 2004

Individual-Level Characteristics			
	<i>b</i> (<i>se</i>)	OR	95% CI
<i>Respondent Attributes</i>			
Age	−.005 (.005)	.995	(.985, 1.005)
Gender	.655 (.185)***	1.925	(1.339, 2.766)
<i>African Group Membership</i>			
Fur	.679 (.252)**	1.973	(1.206, 3.231)
Masaleit	.727 (.200)***	2.070	(1.398, 3.064)
Zaghawa	.384 (.192)*	1.469	(1.008, 2.141)
<i>Attacking Groups</i>			
GoS and Janjaweed	.652 (.165)***	1.920	(1.389, 2.653)
<i>Ethnic Protection</i>			
Arab Villages Spared	1.123 (.231)***	3.074	(1.957, 4.830)
Intercept	−1.737 (.288)	.176	(.097, .320)

Note: *N* = 932 individuals in twenty-two settlement clusters.

* *p* < .05, ** *p* < .01, *** *p* < .001.

combined forces on sexual victimization nor for the persistence of an effect of racial epithets on sexual victimization after statistically controlling for combined attacks.

Modeling the Sexual Victimization

To the extent that ethnic cleansing and genocide victimization encompass a group “in whole”—as, for example, a “scorched earth” policy would imply—there might be little within- or between-settlement variation in number of deaths or severity of victimization of the kind whose quantitative measurement we have just described; all would be victimized. On the other hand, to the extent that this group victimization is “in part,” there should be variance in both within- and between-settlement outcomes. For the criminological and legal reasons we have indicated, we were particularly interested in determining the role that racial intent played in explaining variation in Sudanese state-organized victimization, along with the Janjaweed militias, of the black African groups and settlements.

Our interest was thus in the settlements as much as in the individuals who are the victims of the Darfur conflict as represented in the ADS sample. The hypothetical process examined in our analysis is shown in Figure 4. We analyzed the combined roles of GoS forces with Janjaweed militias in racially targeted mass atrocities, as well as in the selective protection of nearby Arab villagers. Selective protection as well as predation can be an instrumental way

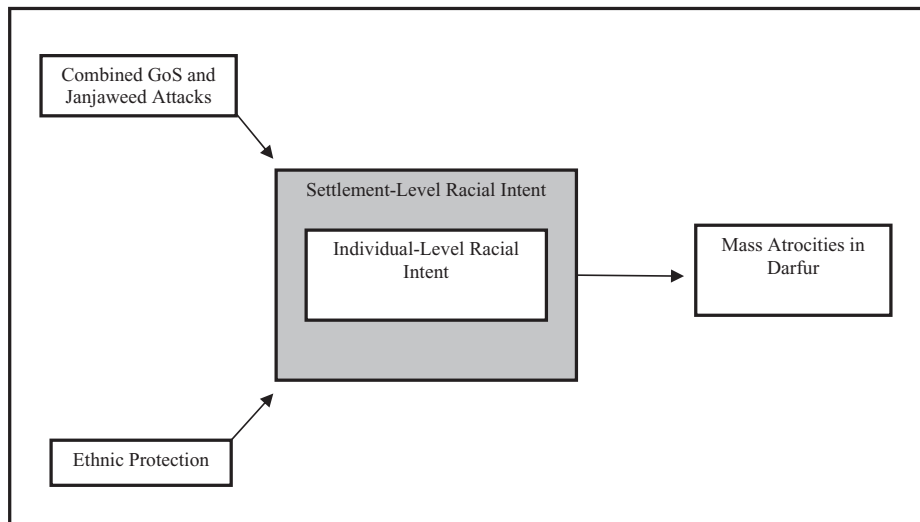


FIGURE 4.
Combined Roles of GoS and Janjaweed with Ethnic Protection in Racially Targeted Ethnic Cleansing and Mass Atrocities in Darfur

of separating “us” from “them” in an organizational dynamic of violence and ethnic cleansing resulting in mass atrocities.

Table 3 presents Poisson models of sexual violence, with robust standard errors and successively adjusted for dispersion and for months of exposure before respondents’ flight, as well as controlling for respondents’ own reported sexual victimization. The results are strikingly consistent across the columns. A significant age effect indicates that younger respondents reported more sexual victimization. More striking is the direct and significant role of the combined government and Janjaweed forces in explaining sexual victimization. More striking still is the simultaneously significant role of racial intention when measured as a proportion of respondents who heard racial epithets at the village level. This effect is the net of all other variables in the table, including racial epithets measured at the individual level, as well as respondents’ own reported sexual victimization. As expected, the latter self-reports have a highly significant effect on the reported sexual victimization of others. The effects of combined GoS and Janjaweed attacks and village-level racial intention remain statistically significant, withstanding controls for bias and unmeasured heterogeneity in reports of sexual victimization.

The fact that ethnic group membership exercises statistically significant effects on the hearing of racial epithets (Table 2), and that these racial epithets measured at the village level exercise statistically significant effects on sexual victimization (Table 3), is consistent with the causal inference that ethnic group membership and racial intentions directly and indirectly lead to sexual victimization (see Baron and Kenny 1986, 1180–81). This sequence of findings is an important part of the reasonable grounds evidence indicating that the protected group statuses of ethnicity and race are associated with sexual violence in ways that violate the Genocide Convention. A more detailed discussion of checks on the further sources of causal dependency in the Poisson models presented in Table 3 is provided in the Appendix.

The results from the Poisson model of sexual victimization are summarized graphically in Figure 5. This figure shows the predicted number of other persons sexually victimized in the villages, which results from the proportion of respondents who reported hearing racial epithets. The figure also shows that the attacking forces were a combination of GoS and Janjaweed forces.²³ Thus, the top line in this figure indicates that an average of more than one person and as many as two were reported sexually victimized when half or more of the respondents reported hearing racial epithets during attacks by combined GoS and Janjaweed forces. Sexual victimizations were reported less often when the attacks were described as being perpetuated by separate GoS or Janjaweed forces and occurring in the absence of racial epithets. The

23. Other variables in the Poisson model are set at their mean values.

TABLE 3.
Alternative Individual and Village Cluster Models of Sexual Victimization, Atrocities Documentation Survey, Darfur Refugees,
July–August 2004

Individual Level	Model 1. Fixed Effects, Exposure Adjusted <i>b</i> (<i>se</i>)	Model 2. Fixed Effects, Exposure Adjusted, Own Victimization Included <i>b</i> (<i>se</i>)	Model 3. Fixed Effects, Exposure Adjusted, Own Victimization Included, Robust Standard Errors <i>b</i> (<i>se</i>)	Model 4. F Fixed Effects, Exposure Adjusted, Own Victimization Included, Robust Standard Errors, Over Dispersion Adjusted <i>b</i> (<i>se</i>)
Age	-.022(.003)***	-.018(.003)***	-.018(.006)**	-.019(.006)**
Male	.043(.065)	.228(.071)**	.225(.186)	.235(.183)
Fur	.754(.183)***	.503(.184)**	.503(.497)	-.235(.379)
Masaleit	.058(.151)	-.002(.153)	-.002(.379)	-.380(.335)
Zaghawa	-.033(.178)	-.079(.177)	-.079(.553)	-.514(2.85)
GoS & Janjaweed	.270(.072)***	.329(.073)*	.329(.165)*	.345(.164)*
Arabs Spared	.222(.103)	.190(.104)	.190(.153)	.196(.165)
Own Victimization		1.124(.095)***	1.124(.230)***	1.180(.229)***
Racial Epithets	.300(.063)***	.294(.063)***	.294(.183)	.290(.188)
Village Level				
Mean Racial Epithets	3.564(1.157)**	3.367(1.082)**	3.367(1.298)**	2.518(.905)**
Intercept	-3.778(.147)	-3.807(.136)	-3.867(.159)	-3.660(.100)

N = 932 individual in twenty-two village clusters.

* $p < .05$, ** $p < .01$, *** $p < .001$.

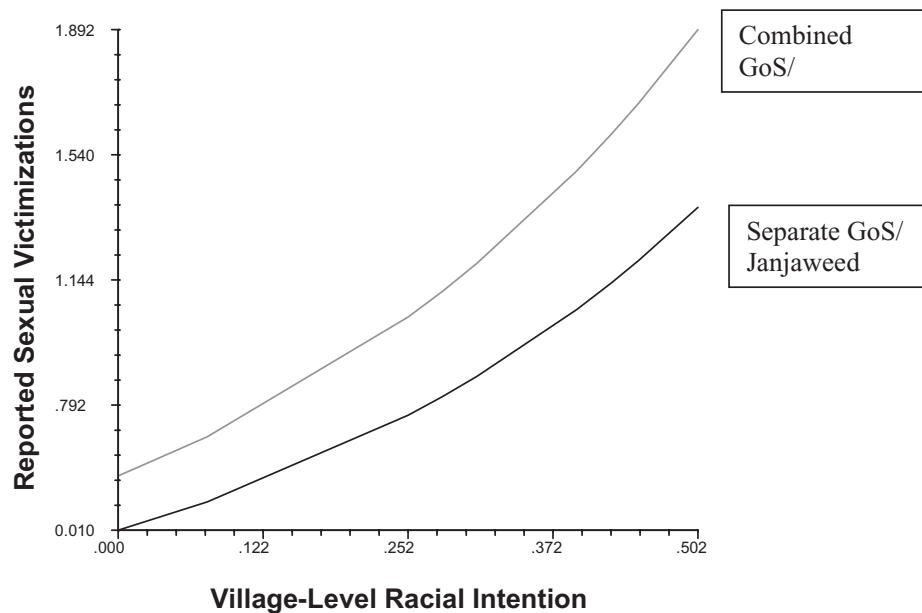


FIGURE 5.
Additive Effects of Combined GoS and Janjaweed Attacks in Racially Targeted Sexual Victimization in Darfur

combined weight of the described analyses paints a compelling picture of GoS and Janjaweed joint participation in sexual violence against black Africans. As the statistically controlled analysis of the use of racial epithets indicates, this jointly perpetuated violence appears to have been intended to destroy the targeted group's way of life.

V. CONCLUSIONS

High Commissioner Pillay (2009a; also in this symposium) reminded the colloquium that the prosecution of grave sexual attacks in international criminal law is not merely an option, but rather it is a responsibility:

Let me reiterate and summarize the key elements of the cases from the tribunals. To begin with, international justice has now deemed rape as a natural and foreseeable consequence of a lack of discipline in cases involving other violations of international humanitarian law. Further, it has established command responsibility and upheld the duty of enquiry to reflect the obligation of persons in a position of responsibility and authority to prevent violations from occurring, and to punish perpetrators when such crimes are committed. In addition, it considered that culpability could involve all those engaged in sexual violence crimes, directly or indirectly.

Failure to prosecute gender and sexual violence that occurs in conflict zones is an evasion of the responsibility to protect those victimized and is a legally unacceptable form of denial. Prosecutor Moreno-Ocampo (2009) put the matter squarely when he said, "It is normal that President Al Bashir denies the crime, but the question is: why is the international community joining in the denial?"

In July 2008, the ICC Office of the Prosecutor, led by Prosecutor Moreno-Ocampo, applied to the Judicial Chambers of the ICC for charges including rape and genocide against Sudan's president.²⁴ In March 2009, the ICC judges issued a warrant for the arrest of President al-Bashir on charges of crimes against humanity, extermination, and rape—but not genocide.²⁵ This last decision was appealed.²⁶ The ICC judges' decision not to charge genocide ignored the importance of social science evidence demonstrating the racial targeting of protected groups in Darfur for acts of sexual violence and constituted a legal denial of a key part of the racially based mens rea that led to rape and sexual violence in Darfur. This failure of the international community to provide protection to racially targeted groups in Darfur has been rectified by the recent reversal of the Pretrial Chamber and the issuance of an arrest warrant for President al-Bashir for crimes of genocide. The question remains, however, as to what evidence will be used in an attempt to convict al-Bashir before the ICC and in future cases of genocide.

The evidence we present indicates that Fur, Masaleit, and Zaghawa farmers and villagers in Darfur heard racial epithets with increasing frequency during attacks in the summer of 2003. This was the period when the Sudanese central government reinstalled militia leader Musa Hilal in Darfur and when Deputy Minister Ahmad Harun held public meetings in Darfur with Hilal. The Fur, Masaleit, and Zaghawa villagers heard racially motivated shouts and slurs more often when GoS forces joined with Janjaweed groups in attacks on their farms and settlements. These villagers also experienced violent victimization more often when they heard these epithets. This victimization included mass atrocities in general and sexual attacks in particular. The unfolding pattern of events was both undeniable and foreseeable upward through the chain of command, reaching to the highest level of Sudan's government and ending at President al-Bashir. It was his responsibility to protect the citizens of Darfur from these attacks. Because he failed to do so, and indeed had "specific intent" to destroy these citizens, it is now the responsibility of the ICC to prosecute President al-Bashir for crimes against

24. See Situation in Darfur (2008, 1): Al Bashir "bears criminal responsibility for the crime of genocide."

25. See *Prosecutor v. Al Bashir* (2009a, para. 206), finding insufficient evidence of genocidal intent. But see *Prosecutor v. Al Bashir* (para. 105): "I am satisfied that there are reasonable grounds . . . to believe that Omar Al Bashir has committed the crime of genocide."

26. See Situation in Darfur (2009); see also *Prosecutor v. Al Bashir* (2010), granting prosecutor's appeal and remanding to the trial court.

humanity, extermination, rape, and genocide. The data and analyses described in this article aid in doing so.

APPENDIX: THE ISSUE OF DEPENDENCY IN MODELING THE REPORTED SEXUAL VICTIMIZATION OF OTHERS IN DARFUR

The Poisson model assumes that reported events of sexual violence occur independently. Yet there may be sources of dependence. There are two possibilities: (1) a single source is responsible for the reports of each person but the sources are independent (that is, they are not the same), or (2) a single source is responsible for the reports of each person and the source is correlated across persons.

If (1) is the case, then the number of acts of violence reported by each individual within a fixed time period could be considered Poisson if the events occur independently of each other. But if (2) is the case and there is a single source, say, a single battle or attack or clustered sampling of respondents in villages, then the number of violent events reported may not follow a Poisson. Controls for the respondent's own victimization, which we include in our model, help to purge for dependency but do not completely explain it away. Fortunately, the hierarchical linear model (HLM) we have used further addresses the second set of possibilities.

HLM allows the calculation of robust standard errors that are adjusted for the increased within-group homogeneity resulting from sampling of clustered respondents. HLM further allows for the adjustment of coefficients and standard errors for increased heterogeneity resulting from correlated sources of over-dispersion. For example, the correlated targeting of attacks on selected villages can result in increased heterogeneity or variance in reported events across villages. HLM allows a relaxation of the independence assumption by not imposing distributional assumptions on the extra-Poisson variance parameter. The result is a negative binomial model yielding estimates that can better capture the underlying process: the adjusted coefficients are efficient and the standard errors are unbiased.

Table 3 presents coefficients and standard errors in four different models, all of which include adjustments for length of the respondent's exposure to risk before his or her flight. However, Model 1 does not include reports of the respondent being sexually victimized in estimating the reported sexual victimizations of others. Five variables significantly predict sexual victimization of others in this model—being younger, being Fur, combined attack by GoS forces and Janjaweed militia, individual-level reports of hearing racial epithets, and mean village-level reports of hearing racial epithets.

Model 2 adds the control for self-reports of the respondent's own sexual victimization, which is statistically significant and strong. The biggest change

in Model 2 is that gender is now statistically significant. This makes sense, because in Darfur women more often than men report being raped, while men more often report others being raped. The latter effect is suppressed in Model 1 and revealed in Model 2 by the inclusion of the measure of the respondent's own sexual victimization. In addition, the five variables previously found statistically significant remain so. The effect of being Fur declines by about one-third in strength, while the effect of combined GoS and Janjaweed attacks increases by more than 20 percent.

The final two models, Models 3 and 4, introduce two further adjustments: robust standard errors (Model 3) and adjustment for over-dispersion (Model 4). These models yield similar results. The effects of gender, being Fur, and individual-level racial epithets now are reduced below significance, while the following four variables retain their strength and statistical significance: being younger, combined attack by GoS forces and Janjaweed militia, the respondent's own sexual victimization, and village-level mean of respondents hearing racial epithets. The village-level effect of hearing racial epithets is reduced by about one-quarter in size, but the standard error of this coefficient is similarly reduced, so the statistical significance of this effect remains stable.

The essential point is this: across the four models, the key variables in our analysis—combined attacks and village-level racial epithets—remain stable in their significant effects on the reported sexual victimization of others.

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